FUNG TAT SHOES TRADING CO.

v.

KOTA BHARU EKONOMI SUPERMARKET SDN. BHD.

HIGH COURT, KOTA BHARU
DATO' IDRIS BIN YUSOFF J.
[CIVIL APPEAL NO. 23-231-1987]
20 APRIL 1993

PRACTICE AND PROCEDURE: Writs of seizure and sale - Difference between judgment and attachment before judgment - Priorities - Rateable distribution - Court commission - Auctioneer's commission.

The plaintiff obtained judgment against the defendant on 7 November 1986. Armed with his judgment the plaintiff commenced execution proceedings against the defendant by the issuance of a writ of seizure and sale on 17 January 1987. Following the attachment, other creditors, in order to safe guard their interest, moved in to attach the said properties relying either on judgments or orders for attachment before judgment secured by them prior to attachment.

The sale by public auction of the assets of the defendant was carried but by the bailiff on 21 April 1987. The questions to be decided were

(i) who were the creditors that were entitled to rateable distribution
(ii) payment of auctioneer's commission - is it included in the Court's commission.

Held:

[1] In an order for attachment before judgment the element of sale is lacking, it is merely intended "to seize and hold". It is therefore clear that the phrase "in execution of an order or judgment" in O. 51A r. 1(1) distinctly refers to an order or judgment vested with the power to sell and the seizure under an order for attachment before judgment cannot by any legal fiction be equated with the attachment in execution.

[2] The object of attachment before judgment is primarily to thwart any attempt by the defendant to frustrate the satisfaction of any judgment that may be passed against him. Unlike in the case of judgment or order for the payment of money whereupon its execution by issuance of a writ of seizure and sale may be carried out immediately upon payment becoming due, the attachment under an order for attachment before judgment is simply to impound the property so as to enable the plaintiff to realise the amount of his judgment if he gets one. He has no lien or charge over the property which still remain that of the defendant; in other words everything remains as before the attachment save that it has been taken out of the power of the defendant to dispose of the property attached.

[3] Order 74 r. 8 of the Rules of the High Court provides nothing more than the mode of effective seizure. The rule is only intended to give effect to the order for attachment as a mere order, without more, is not sufficient to render any effect of attachment. There will only be attachment once the prescribed procedures for making an attachment have actually been gone through. Furthermore it is only a rule of procedure and not one of substantive law. It does not possess the like effect of an attachment in execution.

[4] It is clear the effect of paragraph O. 46 r. 17(3)(f) is that where there are more than one writs of execution issued against the same defendant, payments are to be effected according to the priorities of the writs which are determined according to the dates of issue. It is for the specific purpose of such payment that in the case of attachment before judgment priority is deemed to date back to the date of issue of the order but this is however contingent upon the writ of execution being issued pursuant to an application to enforce a judgment in the same action. Only upon the issue of the writ of execution the attachment before judgment enures and becomes an attachment in execution. If no such writ is issued the proviso to (f) is of no consequence.

[5] The auctioneer's commission amounting to RM3,127.73 paid out separately from the proceeds of auction in fact should have been deducted from the Court's commission.

[Orders accordingly].

Cases referred to:

Re Sing Sing Electrical Works & Ors. Application [1972] 1 MLJ 108 ***(cit)***

Ee Kim Kin v. Collector of Land Revenue Alor Gajah [1967] 2 MLJ 89 **(cit)**

Legislation referred to:

Debtors Act 1957, s. 19(2)
Employment Act 1955, s. 31

Rules of the High Court 1980, O. 46 r. 17(3)(f), O. 51A r. 1(1) & 3 & O. 74 r. 8
Subordinate Courts Rules 1980, O. 30A r. 3

Other sources referred to:
Indian Civil Procedure Code, Mulla, p. 297

For the plaintiff - M/s. Manjit Singh Sachdev, Mohd. Radzi & Partners
For the defendant - Unrepresented

JUDGMENT

Idris bin Yusoff J:
Gan Sim Kheng (Gan), one of the judgment creditors, obtained judgment against defendant in the High Court at Kota Bharu on 19 February 1987 for a sum of RM121,000 and costs of RM225. Prior to this there were a number of other creditors who either obtained judgments in the lower courts or orders for attachment before judgment against the same defendant. The first of such creditors was Fung Tat Shoes Trading Co. (suing as a firm), having filed a claim in the Magistrate's Court at Kajang on 23 August 1986 for a sum of RM5,887.00 - judgment was entered in favour of the said firm on 7 November 1986. Armed with this judgment the firm commenced execution proceedings in Kota Bharu Sessions Court against the defendant by the issuance of a writ of seizure and sale on 17 January 1987 and consequently the Bailiff of the Sessions Court attached the moveable properties of the defendant.

Following the attachment by Fund Tat other creditors, in order to safeguard their interests, moved in to attach the said properties also relying either on judgments or orders for attachment before judgment secured by them prior to attachment. Among them were two creditors who obtained judgments from the High Courts - one at Kota Bharu namely Gan and the other at Penang namely Lo Heng Hock t/a Grand Central Enterprise Co. (Lo) on 22 September 1987 for a sum of RM120,296.70 and costs. Lo had earlier on 10 February 1987 obtained an order for attachment before judgment against the property of defendant. It would be noted that some of those creditors who previously obtained orders for attachment before judgment, managed to obtain judgments before the date of realisation.

The sale by public auction of the assets of the defendant was carried out by the bailiff of the Sessions Court at Kota Bharu on 21 April 1987 and upon completion of the said sale a sum of RM314,140.65 was realised and was paid to the Sessions Court Kota Bharu for the purpose of rateable distribution to be conducted by the said court.

On 15 October 1987 after hearing arguments advanced by Mr. Teo Poh Oon counsel for Gan and Mr. Thanggaiya counsel of Lo the Sessions Court made an order that the matter be transferred to High Court at Kota Bharu to be further dealt with by the Senior Assistant Registrar. The said order was made pursuant to O. 30A r. 3 of the Subordinate Courts Rules 1980 and O. 51A r.3 of the Rules of the High Court 1980. However before making the said order the Sessions Court had already allowed certain payments to be made from the proceeds of sale. It is also noted that on 5 November 1987 upon approval by the Senior Assistant Registrar a claim by EPF amounting to RM40,191 was paid out from the proceeds of sale, so was a sum for RM26,750 paid to the landlord on 20 December 1987 for arrears of rent due under a writ of distress. Again on 6 March 1988 the claim by Labour Department for a sum of RM14,065.92 as representing the amount of unpaid wages under s. 31 of the Employment Act 1955 was also allowed and paid. Thus the remaining balance will have to be distributed rateably among the other creditors who are qualified for such distribution.

The question to be decided by the Senior Assistant Registrar then was who were the creditors that were entitled to rateable distribution apart from the supplementary question regarding payment of auctioneer's commission.

Counsel for Gan submitted before the Senior Assistant Registrar that not all judgment creditors who had earlier attached the properties of the defendant were entitled to rateable distribution as some had not complied with proviso (d) to O. 51A r.1(1) of the Rules of the High Court while others had procured only orders for attachment before judgment by the time the assets were realised. He also highlighted the question of auctioneer's commission which according to item 104 of Appendix B to the Rules of the High Court 1980, the said commission had already been included in the court's commission.

Counsel for Lo however contended otherwise. He maintained that creditors who obtained orders for attachment before judgment were on the same footing as the judgment creditors, and considering the unusually peculiar circumstances of the case proviso (d) to O. 51A r. 1(1) need not necessarily be complied with.

It would appear that solicitors for other judgment creditors did not put in any submission presumably they must have associated themselves with the submission advanced by Lo's Counsel.

The Senior Assistant Registrar after hearing both counsel and after reading their written submissions allowed "rateable distribution among all the judgment creditors who are entitled to the distribution of the proceeds of sale." To my mind that decision, with respect, takes us to nowhere as the very essence of the matter *viz:* who were the judgment creditors "entitled to the distribution of the proceeds of sale", was not ascertained and for some unknown reason, his decision did not touch on the subsidiary question relating to auctioneer's commission.

When the appeal comes on for hearing before me the same arguments are canvassed by both counsel but this time two other counsel representing a few other judgment creditors join in the submission.

In deference to the court's request and for the convenience of all parties counsel for Gan has put up a list, after liaising with respective counsel, showing all the particulars considered relevant to the matter. The list can be found in the appendix attached to his written submission. Looking through the list it shows that altogether 18 creditors were affected - their names and particulars are set out below:

(1)	a.	Name of Creditor	: Gan Sim Kheng
	b.	Date of Writ/Summons was issued	: 4 February 1987
	c.	Suit/Summons No	: Mahkamah Tinggi Kota Bharu 23-35-87
	d.	Date of Judgment	: 19 February 1987
	e.	Judgment Sums Costs	: RM121,000.00 RM225.00
	f.	Date of issue of Writ of Execution	: 26 February 1987
	g.	Date of Notice to SAR	: -
	h.	Date of Order for Attachment before Judgment if any	: -
(2)	a.	...	: Boustead Trading (1985) Sdn. Bhd.
	b.	...	: 28 January 1987
	c.	...	: Mahkamah Sesyen Kota Bharu 62-45-87
	d.	...	: 21 March 1987
	e.	...	: RM16,794.99 RM495.00
	f.	...	: -
	g.	...	: 21 March 1987
	h.	...	: -
(3)	a.	...	: Yoon Tat Sdn Bhd
	b.	...	: 11 February 1987
	c.	...	: Mahkamah Sesyen Kota Bharu 62-66-87
	d.	...	: 28 February 1987
	e.	...	: RM11,900.00 RM650.00
	f.	...	: 19 March 1987
	g.	...	: -
	h.	...	: -
(4)	a.	...	: Yuan Fatt Trading Co.
	b.	...	: 11 February 1987
	c.	...	: Mahkamah Sesyen Kota Bharu 62-67-87
	d.	...	: 28 February 1987
	e.	...	: RM11,900.00 RM650.00
	f.	...	: 19 March 1987
	7.	...	: -
	8.	...	: -
(5)	a.	...	: Harpers Trading (M) Sdn. Bhd.
	b.	...	: 30 November 1986
	c.	...	: Mahkamah Sesyen Kota Bharu 62-526-86

d. ... : 6 April 1987

e. ... : RM11,384.22
RM421.50

f. ... : 14 March 1987

g. ... : -

h. ... : 8 February 1993

(6) a. ... : Pustaka Bumi
Sdn. Bhd.

b. ... : 26 January 1987

c. ... : Mahkamah Sesyen
Kota Bharu
62-40-87

d. ... : 3 March 1987

e. ... : RM13,676.61
RM452.50

f. ... : 15 March 1987

g. ... : -

h. ... : 27 January 1987

(7) a. ... : Soon Cheong (M)
Sdn. Bhd.

b. ... : 10 February 1987

c. ... : Mahkamah Sesyen
Kota Bharu
62-65-87

d. ... : 3 March 1987

e. ... : RM11,881.72
RM398.50

f. ... : 14 March 1987

g. ... : -

h. ... : 11 February 1987

(8) a. ... : Beng Huat Market

b. ... : 26 January 1987

c. ... : Mahkamah
Majistret
Kota Bharu
82-68-87

d. ... : 3 March 1987

e. ... : RM4,641.22
RM217.50

f. ... : 14 March 1987

g. ... : -

h. ... : 21 January 1987

(9) a. ... : Chuan Lam Chan

b. ... : 26 January 1987

c. ... : Mahkamah
Majistret
Kota Bharu
82-67-87

d. ... : 3 March 1987

e. ... : RM3,718.76
RM256.50

f. ... : 15 March 1987

g. ... : -

h. ... : 27 January 1987

(10) a. ... : Marketlink (M)
Sdn. Bhd.

b. ... : 28 January 1987

c. ... : Mahkamah
Majistret
Kota Bharu
82-85-87

d. ... : 3 March 1987

e. ... : RM6,829.22
RM256.50

f. ... : 15 March 1987

g. ... : -

h. ... : 31 January 1987

(11) a. ... : Pernas Sime
Darby Trading
Sdn. Bhd.

b. ... : 29 December 1986

c. ... : Mahkamah Sesyen
Kota Bharu
62-579-86

d. ... : 3 March 1987

e. ... : RM24,061.78
RM724.50

f. ... : 15 March 1987

g. ... : -

h. ... : 27 January 1987

(12)a. ... : Yee Lee Trading Co. Sdn. Bhd.

b. ... : 9 February 1987

c. ... : Mahkamah Majistret Kota Bharu 89-59-87

d. ... : 11 February 1987

e. ... : RM2,275.05 RM172.00

f. ... : -

g. ... : -

h. ... : -

(13)a. ... : Sheng Lee Trading (M) Sdn. Bhd.

b. ... : 8 February 1987

c. ... : Mahkamah Majistret Kota Bharu 82-111-87

d. ... : 11 February 1987

e. ... : RM8,200.47 RM322.00

f. ... : 12 February 1987

g. ... : -

h. ... : -

(14)a. ... : Eastern Agencies (M) Sdn. Bhd.

b. ... : 27 January 1987

c. ... : Mahkamah Majistret Kota Bharu 82-71-87

d. ... : 7 February 1987

e. ... : RM6,498.12 RM272.00

f. ... : -

g. ... : -

h. ... : -

(15)a. ... : Fung Tat Shoes Trading Company

b. ... : 23 August 1986

c. ... : Mahkamah Majistret Kajang 82-161-86

d. ... : 7 November 1986

e. ... : RM5,887.00

f. ... : 16 January 1987

g. ... : -

h. ... : -

(16)a. ... : Lo Heng Hock t/a Grand Central Enterprise Co.

b. ... : 10 February 1987

c. ... : Mahkamah Tinggi Pulau Pinang 23-42-87

d. ... : 22 September 1987

e. ... : RM120,296.70 Kos - untuk taksiran

f. ... : 8 April 1988

g. ... : -

h. ... : 10 February 1987

(17)a. ... : Syarikat Mohd Salleh & Sulaiman Sdn. Bhd.

b. ... : 28 January 1987

c. ... : Mahkamah Majistret Kota Bharu 82-83-87

d. ... : 11 March 1987

e. ... : RM5,726.10 RM256.50

f. ... : -

g. ... : 15 March 1987

h. ... : -

(18)a. ... : Yeo Hiap Seng Trading Sdn. Bhd.

b. ... : 12 February 1987

c. ... : Mahkamah Majistret Kota Bharu 82-117-87

d. ... : 15 March 1987

e. ... : RM4,875.42
RM202.00

f. ... : 19 March 1987

g. ... : -

h. ... : -

O. 51A r.1(1) says:

> 1. (1) Where assets are realised by sale or otherwise in execution of an order or judgment and more persons than one have, prior to the realisation, attached the property from which such assets have been realised in execution of orders or judgments for the payment of money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be distributed rateably among all such persons;

It seems to me that the crucial phrases are:

(i) ... prior to realisation, attached the property ...
(ii) ... in execution of orders or judgments for the payment of money ....

As can be observed the date of realisation is not at all in dispute, hence the attachment must be done prior to 21 April 1987. However the sore point is what constitutes the execution of orders or judgments for the payment of money.

Counsel for Gan says the execution must be supported by judgment or order for the payment of money against the same judgment debtor [see *Re Sing Sing Electrical Works & Ors.* Application [1972] 1 MLJ 108]. He stresses that the order of attachment before judgment obtained under the Debtors Act 1957 is not an execution of a decree for the payment of money. The attachment of the defendant's property is merely to serve as a pledge or surety to answer the just demand of the plaintiff until the trial of the action and satisfaction of any judgment that may be made against the defendant. He says if support is required for his argument such support can be found in "**Mulla Indian Civil Procedure Code"** which says at page 297:

> Attachment before judgment - a decree holder who has caused the property to be attached before judgment; is not entitled to share in a rateable distribution of the sale proceeds of that property, unless he makes after judgment a fresh application for execution ...

Counsel for Lo on the other hand says an order for attachment before judgment once carried out answers the requirement of the attachment of the property before realisation as envisaged in O. 51A r.1(1) since the said rule does not only confine to execution of judgment for the payment of money but also to the execution of order for the payment of money. He also refers to O. 74 r. 8 of the Rules of the High Court wherein it is said:

> 8. Any property liable to seizure under Part V of the Ordinance shall be seized in the same manner as a seizure under a writ of seizure and sale.

He concludes that there is no doubt an order for attachment before judgment "is an order for execution" thereby meeting the qualification of the phrase "... in execution of an order ...". To further strengthen the argument he refers to s. 19(2) of the Debtors Act 1957 which reads:

> 19.(2) In the case of immovable property the seizure shall be made in the manner provided by rules of court for the seizure of such propery in execution of a judgment.

Thus he says the claim by Gan's counsel that the attachment of the property on the strength of the order for attachment before judgment does not amount to "an execution" is indeed fallacious.

To add weight to his argument counsel for Lo says that judging from the order of attachment before judgment obtained by Lo and addressed to the Sheriff of the High Court, Kota Bharu, with particular reference to para 2 thereof, which reads:

> You are hereby **ordered to forthwith seize all moveable property** liable to be seized under a **Writ of Seizure and Sale** which shall be identified by or on behalf of Lo Hung Hock the plaintiff as belonging to Messrs. Kota Bharu Ekonomi Supermarket Sdn. Bhd., the defendant to the value of RM120,296.70 being the amount of claim as a **pledge or surety to answer the just claim of the plaintiff amounting to RM120,296.70 until the trial of this action** and **satisfaction of any judgment that may be given against the defendant herein.**

the said order comes within the scope and intent of the expression "in execution of an order" as contemplated by O. 51A r. 1(1).

The tone of this order, as appears to me, is merely to direct the sheriff to immediately seize moveable property of the defendant and to hold them as a pledge or surety to answer the just claim of the plaintiff; whereas a writ of seizure and sale which constitutes a process towards the execution of a judgment or order is directed to the sheriff with a command to "cause to be levied and made out of the property liable to be seized ... by seizure and if it be necessary by sale thereof ... Thus, in an order for attachment before judgment the element of sale is lacking, it is merely intended "to seize and hold". It is therefore clear to me that the phrase "in execution of an order or judgment" in O. 51A r. 1(1) distinctly refers to an order or judgment vested with the power to sell and the seizure under an order for attachment before judgment cannot by any legal fiction be equated with the attachment in execution.

Mr. Foo Say Ghee on behalf of seven other judgment creditors does not touch very much on this point as his clients apart from initially obtained orders for attachment before judgment subsequently before the date of realisation, obtained judgments and all except one filed in writs of execution before the said date.

Nik Haizam bt Nik Jaafar who represents two judgment creditors that is, Boustead Trading (1985) Sdn. Bhd. and Syarikat Mohd. Salleh & Sulaiman Sdn. Bhd. also puts in written submission. It is however noted that although in these two cases judgments were obtained prior to date of realisation no execution was applied for except that an order for attachment before judgment was obtained on 31 January 1987 by Syarikat Mohd. Salleh & Sulaiman Sdn. Bhd.

As can be gathered the object of attachment before judgment is primarily to thwart any attempt by the defendant to frustrate the satisfaction of any judgment that may be passed against him. Unlike in the case of judgment or order for the payment of money whereupon its execution by the issuance of a writ of seizure and sale may be carried out immediately upon payment becoming due, the attachment under an order for attachment before judgment is simply to impound the property so as to enable the plaintiff to realise the amount of his judgment if he gets one. He has no lien or charge over the property which still remains that of the defendant; in other words everything remains as before the attachment save that it has been taken out of the power of the defendant to dispose of the property attached. There may sometimes be occasions where the benefit of the attachment may be enjoyed by others to the exclusion of the one who has procured it. Furthermore under s. 19 of the Debtors Act an order for attachment of the property will only be issued upon the court being satisfied that the plaintiff has a good cause of action against the defendant and that the defendant with intent to obstruct or delay the execution of the judgment which may be made against him is about to dispose of, or is about to remove or conceal any of his property.

As regards O. 74 r. 8 of the Rules of the High Court it seems to me that it provides nothing more than the mode of effective seizure. The rule is only intended to give effect to the order for attachment as a mere order, without more, is not sufficient to render any effect of attachment. There will only be attachment once the prescribed procedures for making an attachment have actually been gone through. Furthermore it is only a rule of procedure and not a substantive law. It does not possess the like effect of an attachment in execution.

The court's attention is also drawn to O. 46 r. 17(3)(f). It is argued by Lo's counsel that by virtue of the said rule "it gives special effect" to his client's claim to participate in the rateable distribution as the order for attachment before judgment was granted on 10 February 1987, judgment was taken on 22 September 1987 and writ of execution was issued on 8 April 1988 - thus the material date is 10 February 1987 well before the date of realisation.

Looking at the said rule 17(3) it seems that the said proviso is clearly intended to draw distinction in terms of priority relating to the manner in which any money received under a writ of execution or distress is to be applied. The said rule requires the proper officer in the registry to render a statement of account in respect of such money in the order of priority as mentioned thereunder starting with (a) the Court fees and commission followed by (b), (c), (d), (e) and (f) which also has a proviso as follows:

> Provided that where an order for attachment of moveable property before judgment

has been made under the provisions of Part III of the Debtors Ordinance 1957 and a writ of execution has been issued to enforce a judgment in the same action, such writ shall have priority according to the date on which the order of attachment before judgment was issued.

It is clear the effect of paragraph (f) is that where there are more than one writ of execution issued against the same defendant, payments are to be effected according to the priorities of the writs which are determined according to the dates of issue. It is for the specific purpose of such payment that in the case of attachment before judgment priority is deemed to date back to the date of issue of the order but this is however contingent upon the writ of execution being issued pursuant to an application to enforce a judgment in the same action. Only upon the issue of the writ of execution that the attachment before judgment enures and becomes an attachment in execution. If no such writ is issued the proviso to (f) is of no consequence.

Counsel for Lo in his submission also stresses on certain prerequisites that have to be observed before a party is entitled to rateable distribution. He says:

> Only those parties who **had attached** the Kota Bharu Ekonomi Supermarket Sdn. Bhd.'s property in **execution of orders** or judgments for the payment of money **prior to the realisation** shall be entitled to rateable distribution.

It is therefore not disputed that if the prerequisites are not complied with a judgment creditor will be disqualified to participate in the distribution. Be that as it may a judgment creditor who does not qualify, or for some reasons does not wish, to participate in the distribution can still execute his judgment by resorting to some other remedies provided by law as his substantive right in the judgment is not extinguished. And to my mind paragraph (f) with its proviso will assume importance when such remedy is being undertaken.

In view of what I have said it is my judgment that the seizure of the property under an order of attachment before judgment cannot be and is not intended to be construed as an "execution" of orders or judgments for the payment of money.

As also contended by counsel for Gan, a further qualification to participate in rateable distribution is compliance with proviso (d) to r. 1(1). In this case since there was an attachment by the High Court before the goods were sold, the requisite notice must be sent to the Senior Assistant Registrar by the decree holders of Subordinate Court. This contention is strongly resisted by counsel for other creditors and they urge the court under the circumstances to diagree with it.

I must say that on reading the proviso, I am bent to agree with Gan's counsel as the said proviso is clear but in this case that is not all there is to it for the circumstances prevailing appear somewhat unusual which call for further consideration by the court.

Rule 3 of O. 51A requires the court of the highest grade or where there is no difference in grade between such courts the court under whose order or judgment the property was first attached to receive and realise the property under attachment and also to determine any claim or any objection that will be made thereon. Thus when the property came to be attached by the High Court that is, when the writ of seizure and sale was issued at the instance of Gan on 26 February 1987 the Subordinate Court should have discontinued with any further action as since then it was the High Court which ought "to receive and realise" the assets. However for some unexplained reasons action was not taken in accordance with the said r. 3 but instead the same Subordinate Court which commenced execution proceedings, went on to conduct the auction.

It is noted that the auction is the culmination of an application for execution of the judgment filed in the Subordinate Court. It is also observed in the said proclamation of sale that the Registrar of Sessions Court Kota Bharu should be contacted if further particulars were required; thereby giving an added impression that the High Court was not dealing with the matter. Under such circumstances could it be expected of the decree holders of the Subordinate Court to give the requisite notice to the Senior Assistant Registrar?

Mr. Foo Say Ghee quoting from a certain article on rateable distribution submits that procedural rules are intended to assist and facilitate and not to hinder the grant to people

of their rights. This statement somewhat reminds me of the view expressed by Ismail Khan J (as he then was) in *Ee Kim Kin vs. Collector of Land Revenue Alor Gajah* [1967] 2 MLJ 89 that "Rules of procedure shall be the handmaiden not the master".

Considering the unusual circumstances of this case and relying on the general principles of justice, equity and good conscience, I hold that the failure to notify the Senior Assistant Registrar by the Subordinate Court decree holders will not detract their entitlement to rateable distribution.

I now come to the final question raised by counsel for Gan i.e. the question of auctioneer's commission.

Under item 104 Appendix B to the Rules of the High Court, 1980 which was at the relevant time identical to item 69 of Schedule B to the Subordinate Courts Rules, 1980 there is specified a commission of 5% to be charged on the first RM1,000.00 and 2 1/2% upon all above that sum when levied by seizure and sale or distress, such sum to include auctioneer's commission - the sum so calculated is to be deducted by the Sheriff or Registrar. On going through the records I find that the auctioneer's commission amounting to RM3,127.73 (calculated according to the rates specified in the Schedule to the Kelantan Auction Sales Enactment 1930) was paid out separately from the proceeds of auction which in fact should have been deducted from the court's commission. The court's commission has already been collected by the Registrar of Sessions Court Kota Bharu.

In the final analysis after considering the arguments and the law I make the following orders:

(1) The appeal by Gan Sim Kheng is allowed in part.
(2) The Registrar of Sessions Court Kota Bharu is to refund a sum amounting to RM3,127.73 which sum shall constitute part of the balance of the proceeds of auction.
(3) That the balance of the proceeds of auction shall be distributed rateably among the following judgment creditors namely:

Gan Sim Kheng, Yoon Tat Sdn. Bhd., Yuan Fatt Trading Co., Pustaka Bumi Sdn. Bhd., Soon Cheong (M) Sdn. Bhd., Beng Huat Mini Market, Chuan Lam Chan, Marketlink (M) Sdn. Bhd., Pernas Sime Darby Trading Sdn. Bhd., Sheng Lee Trading (M) Sdn. Bhd., Fung Tat Shoes Trading Company, Yeo Hiap Seng Trading Sdn. Bhd.

(4) Costs as taxed by Senior Assistant Registrar to be paid to Gan Sim Kheng by Boustead Trading (1985) Sdn. Bhd., Harpers Trading (M) Sdn. Bhd., Yee Lee Trading Co. Sdn. Bhd., Eastern Agencies (M) Sdn. Bhd., Lo Heng Kock t/a Grand Central Enterprise Co., Syarikat Mohd Salleh & Sulaiman Sdn. Bhd.
(5) Gan Sim Kheng is to pay costs as taxed by Senior Assistant Registrar to Pustaka Bumi Sdn. Bhd., Soon Cheong (M) Sdn. Bhd., Beng Huat Mini Market, Chuan Lam Chan, Marketlink (M) Sdn. Bhd., Pernas Sime Darby Trading Sdn. Bhd.